Filed 6/18/12 In re T.W. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re T.W., a Person Coming Under the Juvenile Court Law.	B234036 (Los Angeles County Super. Ct. No. CK56464)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. T.D., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Veronica McBeth, Judge. Affirmed.

Hassan Gorguinpour, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, and Peter Ferrera, Deputy County Counsel, for Plaintiff and Respondent.

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Father T.D. appeals from the denial of his Welfare and Institutions Code section 388 petition requesting unmonitored visitation and reunification services.[1] We affirm.

FACTS AND PROCEDURE

In June 2010, T.W. was detained. She was a few days old. The court sustained the following allegations against father: (1) he has a history of engaging in physical altercations with mother; (2) T.W.'s brother received permanent placement services due to domestic violence; and (3) father failed to protect T.W. from mother's mental illness, which renders mother incapable of providing regular care and supervision.[2]

Father failed to reunify with T.W.'s brother. Father received services from August 2004 until his rights were terminated in November 2007. Father has a criminal history. In 1993, he was convicted of inflicting corporal injury on a spouse or cohabitant (Pen. Code, § 273.5). In 2008, he was convicted of driving under the influence of alcohol. Father's additional arrests for domestic violence did not result in convictions.

In August 2010, the Los Angeles County Department of Children and Family Services (DCFS) reported that father had not addressed his history of domestic violence and illicit substance abuse. In September 2010, DCFS reported that father admitted numerous instances of domestic violence between him and mother in the presence of a nonrelated child. Father claimed that mother instigated the domestic violence. Father stated that he was unaware of the dependency proceedings involving T.W.'s brother because he previously had left mother and T.W. and moved elsewhere. Father explained that he ended his relationship with mother "when he discovered that mother was trading sex for crack cocaine" and found mother in a house surrounded by 20 to 30 gang members. At that time, father did not complete any court-ordered programs because he

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[1] Unless otherwise stated, all statutory citations are to the Welfare and Institutions Code.

[2] The remaining allegations are not relevant to this appeal.

was not aware of the proceedings as "he left the relationship and went down south . . . ." Father testified that he never financially provided for T.W., but he took pictures of her.

In November 2010, DCFS reported that father had enrolled in domestic violence counseling. DCFS reported that father had visited T.W. once. During the first visit, he "seemed unsure what to do with [T.W.]" and left early. Father was scheduled to visit two additional times, but arrived two hours late for one visit and failed to arrive at all for the other. A letter dated January 6, 2011, from the director of parent education at Project Impact stated that father had attended 7 weeks of a 16-week domestic violence class and attended 6 weeks of a 12-week parent training class.

On January 11, 2011, the court denied father reunification services.

On April 5, 2011, father filed a section 388 petition requesting reunification services and unmonitored visitation. Father stated that he had enrolled in parenting and domestic violence classes and was attending individual counseling. Father stated that he visited T.W. on a regular basis. Father attached certificates indicating that he had completed 12 weeks of parent training class and 16 weeks of domestic violence class. Father also attached evidence that he attended two individual counseling sessions. The court denied the petition and set a section 366.26 hearing to select and implement a permanent plan.

On May 10, 2011, DCFS reported that T.W. had been placed in a prospective adoptive home and was likely to be adopted. T.W. was observed to be well taken care of, in good health and very happy. T.W. had a close bond with her prospective adoptive mother. DCFS also reported that father had been consistent with his visits and appropriate during his visits. During one visit, T.W. started to cry, and although father tried to console her, T.W. wanted her prospective adoptive mother.

On May 19, 2011, father filed another section 388 petition. In addition to the information in his prior petition, father stated that he visited consistently and acted appropriately during his visits. Father stated that he has "matured out of the behavior that led to his failure" to reunify with T.W.'s brother. He stated that he had demonstrated a commitment to T.W. and she would benefit by being raised by him. Father attached

evidence that he had been in counseling since December 7, 2010. In his counseling sessions, he discussed parenting and child safety. Father's counselor recommended "at least five more sessions to work on being a healthy person, parenting skills, and domestic violence." The court denied father's second section 388 petition without a hearing. It found father had not stated new evidence or a change of circumstance. The court also found that a change in the order would not promote T.W.'s best interests. Father appealed from the denial of his second section 388 petition.

DISCUSSION

To prevail on a section 388 petition, father was required to show both a changed circumstance and that placing T.W. in his care or extending reunification services was in T.W.'s best interest. (§ 388; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) To require a hearing on his section 388 petition, father was required to make a prima facie showing of facts that would support a favorable decision if his evidence were credited. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) To obtain a hearing, father had to show "probable cause" of a probability of prevailing on his petition. (*In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1414.)

"'When custody continues over a significant period, the child's need for continuity and stability assumes an increasingly important role. That need will often dictate the conclusion that maintenance of the current arrangement would be in the best interests of that child.' [Citations.]" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) Children have a fundamental independent interest in a stable, permanent placement that allows the caretaker to make a full emotional commitment to the child. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306.) Adoption gives a child the best chance at a full emotional commitment from a responsible caretaker. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.)

Father demonstrated substantial efforts to improve his parenting skills and to overcome his history of domestic violence. Father's enrollment in parenting and domestic violence programs on his own, without court-ordered reunification services, is comendable. However, he failed to show a prima facie case that a change in order was in T.W.'s best interest.

Father's bond with T.W. was not comparable to that of T.W.'s foster mother. Providing reunification services would not have advanced T.W.'s needs for permanency and stability, which was the primary focus at the time father made his section 388 petition. T.W. was bonded with her prospective adoptive mother and was happy. T.W. asked for her prospective adoptive mother even when father was visiting. In contrast, father had never cared for T.W., who became a dependent child when she was a few days old. Although father made efforts to learn skills necessary to parent T.W., there was no evidence that a change in order to provide father reunification services would result in any benefit to T.W. Instead, the evidence supported only the conclusion that it was in T.W.'s best interest to stay with the caretaker who loved and had cared for her, and whom she recognized as her parent.

Father's heavy reliance on *In re Kimberly F.* (1997) 56 Cal.App.4th 519 (*Kimberly F.*) is misplaced. In *Kimberly F.*, the court reversed the denial of a section 388 petition, finding it to be a "rare" case. (*Kimberly F.*, at p. 522.) Among other things, the court held that the evaluation of a section 388 petition could not rest only on a comparison of the natural parent's household with that of the child's caretakers. (*Kimberly F.,* at p. 529.) "The 'simple best interest test' provides an incomplete picture of 'best interests' under section 388. It ignores all familial attachments and bonds between father, mother, sister and brother, and totally devalues any interest *of the child* in preserving *an existing family unit*, no matter how, in modern parlance, 'dysfunctional.'" (*Id.* at pp. 529-530.) In *Kimberly F.*, the 7- and 10-year-old children had strong ties to their mother and were attached to their two older brothers who remained in their mother's care. (*Id*. at p. 522.) The children did not wish to be adopted by their caretakers and the mother had "a substantial amount of unmonitored visitation during the period of dependency, and has shown herself to be devoted" to her children. (*Id*. at p. 532.) The court considered all of this evidence when it concluded the juvenile court had abused its discretion in denying the mother's section 388 petition.

In contrast to *Kimberly F.*, here T.W. never lived with father. Although father visited T.W., he never held a parental role and never formed a strong bond with her. This

case is different from *Kimberly F.* because there was no evidence T.W. had an interest in preserving a family unit with father because T.W. *never* had a family unit with father. "It is not enough for a parent to show *just* a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child."[3] (*Kimberly F., supra,* 56 Cal.App.4th at p. 529.) The juvenile court did not abuse its discretion in denying father a hearing on his section 388 petition.

DISPOSITION

The order denying father's section 388 petition is affirmed.

FLIER, J.

We concur:

BIGELOW, P. J.

RUBIN, J.

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3 The *Kimberly F.* court also recommended that an evaluation of a section 388 petition should consider the seriousness of the reason for dependency and the degree with which the problem has been removed. (*Kimberly F., supra,* 56 Cal.App.4th at p. 532.) For purposes of this appeal, we need not decide whether *Kimberly F.* is consistent with *In re Stephanie M.*, which as noted held that stability and continuity are the primary considerations in determining a child's best interests when evaluating a custody determination. (*In re Stephanie M., supra,* 7 Cal.4th at p. 317.) The reasons leading to the dependency were serious as father admitted numerous instances of domestic violence and admitted abandoning mother and T.W.'s brother. Even if father has shown that he removed the concerns leading to the dependency by completing class work and counseling, he has not shown it was in T.W.'s best interest to modify the juvenile court's order.